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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE SEGOVIA CRUZ,

Defendant and Appellant.

G039278

(Super. Ct. No. 05CF1588)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Andrew Mestman and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Rene Segovia Cruz appeals from his conviction on four counts of committing a lewd and lascivious act on a child under the age of 14 in violation of Penal Code section 288, subdivision (a).<sup>1</sup> He contends one of the counts is not supported by substantial evidence, the trial court abused its discretion by denying probation and failing to order a psychological evaluation to assess his eligibility for probation, and the trial court miscalculated his presentence custody credits. Cruz's substantive arguments lack merit, and we affirm his conviction and sentence. Cruz is correct he is entitled to additional presentence custody credits, and we modify the judgment accordingly.

### FACTS

K.M. came to the United States in 2001 with her mother and older brother. They moved in with the maternal grandmother and her boyfriend, Cruz. Cruz was like a grandfather to the children and provided financial support for the family.

At trial, K.M. testified that when she was nine or 10 years old, she was alone in the living room when Cruz entered, grabbed her, pulled off her pants, and orally copulated her. Afterwards, Cruz said "he liked it[.]" she should not tell anyone, and he could "do that whenever he wanted[.]" After that he began to slap K.M. on the buttocks, and tell her "he just wanted [her] all for himself[.]"

On another occasion, K.M. and her brother were in their bedroom watching television. K.M. was sitting alone in the bottom bunk bed; her brother was in the upper bunk. Cruz came in, sat with K.M., and quietly told her "to touch his privates." He then grabbed K.M.'s hand and put it under his clothing on his penis. K.M. pinched Cruz's hand, and he left the room.

In 2004, when K.M. was 11 years old, Cruz came into her room while she was doing homework. He got on the bed with her and began touching her breasts, vagina, and buttocks. He asked her if she liked it. K.M. said she did not and would call

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

the police if he did not stop. Cruz replied he knew she would not call the police. He prevented her from leaving the room and continued touching her for about eight minutes. Another time, K.M. was in the back seat of the car with Cruz, and he kept trying to touch her vagina. K.M. testified she told her brother about what Cruz was doing, but her brother told her to talk to their mother.

In early 2004, K.M., her brother, and her mother went on a trip to Washington State to see K.M.'s father. At the end of the trip, K.M. begged her mother to not return the family to California. K.M. told her mother about Cruz's acts. When her mother asked why she had not reported it sooner, K.M. said she did not think her mother would believe her. The mother telephoned the maternal grandmother, who denied such things could have happened because "I'm always keeping an eye on her[.]" K.M.'s mother spoke with Cruz, who denied K.M.'s accusations. K.M.'s mother returned to Cruz's house with the children, telling K.M. to not tell anyone about the acts because if she did, Cruz would be arrested. She instructed K.M.'s brother to watch K.M. and make sure she was never alone with Cruz.

A few weeks later, when K.M. was alone in her mother's room, Cruz entered and asked why K.M. had told anyone about his acts. K.M. said she told because she did not like it. Cruz responded that no one believed her and he would continue. After that, he would occasionally touch K.M.'s vagina.

In early May 2005, K.M. told her aunt that Cruz was continuing to touch her. The aunt told K.M.'s mother, who asked K.M. why she had not talked to her first. K.M. said she did not tell her because she would not have believed her.

K.M. testified that on one occasion, she walked by Cruz, who was sitting on the couch, and he slapped her on the butt. She subsequently testified the incident happened the day she went to her school for the last time. K.M. testified she could not recall having bruises on her buttocks when she was taken into protective custody, but remembered that pictures were taken of her buttocks. She denied having been wrestling

with her brother or being pushed against a counter so as to have caused bruises. She did not tell anyone she had suffered bruising as a result of being grabbed by Cruz.

On May 19, K.M. reported the sexual abuse to a school teacher, who in turn reported it to authorities, and a social worker was sent to the school to interview K.M. During their interview, K.M. at first denied to the social worker that anything had happened. But when the social worker said she had received a report Cruz had hurt her, K.M. broke into tears. K.M. was still hesitant to answer the social worker's questions, and when asked why, she said her mother had told her to not say anything. After K.M. calmed down, she told the social worker about five incidents of sexual abuse by Cruz.

Two police officers who interviewed K.M. and investigated her allegations testified. K.M. told one of the officers that on May 17 or 18, 2005, she walked by Cruz as he sat on the couch watching television. He grabbed her by the arm, and with his other hand grabbed her buttocks, causing her pain. During his interview, the officer was told by the other officer and the social worker that K.M. said she had bruises she believed had been caused by Cruz grabbing her. The officer did not observe the bruises, but a female crime scene investigator saw and documented bruising on K.M.'s buttocks. The other officer testified K.M. told him about touching Cruz's penis, but she did not discuss bruising on her buttocks from being recently grabbed by Cruz.

The children were removed from the home. Afterwards, K.M., who had been receiving mostly failing grades in school, began improving her grades dramatically because she could now concentrate on her work.

### *Defense*

K.M.'s mother testified she had never seen anything suspicious between Cruz and K.M. K.M. sometimes lied. Once K.M. told school officials she had been in the hospital, when she had not. K.M. had a friend at school who had once lied about having been sexually molested.

The maternal grandmother testified K.M. had a history of lying and sometimes pretended to be sick so she would not have to go to school. She had never witnesses any improper behavior by Cruz, and K.M.'s bruise was the result of being pushed in to the counter.

Cruz was charged with four counts of committing a lewd and lascivious act on a child under the age of 14 in violation of section 288, subdivision (a). Count 1 alleged the acts occurred between May 1, 2005, and May 31, 2005. Counts 2 through 4 alleged the acts occurred between July 1, 2003, and December 31, 2004. Count 2 additionally alleged substantial sexual conduct under section 1203.066, subdivision (a)(8).

The jury found Cruz guilty on all four counts, and found true the special allegation. The trial court denied probation and sentenced Cruz to a total term of eight years comprised of the middle term of six years on count 2, a consecutive two-year term for count 1, and concurrent six-year terms on counts 3 and 4.

## DISCUSSION

### *1. Substantial Evidence Supports Count 1: The May 2005 Incident*

Cruz contends there is insufficient evidence to support his conviction on count 1 because (1) there is no “solid” evidence of any improper touching in May 2005, and (2) there is no “solid” evidence of specific sexual intent as to the incident. We reject both claims.

Cruz argues count 1 fails because there is no evidence of improper conduct during the time frame alleged in the information—the month of May 2005. He relies on *People v. Jones* (1990) 51 Cal.3d 294, and *People v. Jeff* (1988) 204 Cal.App.3d 309. In each of those cases the courts addressed due process requirements that a defendant have adequate notice of the specific charges so as to present a defense. In short, the constitution requires the evidence “supports the number of offenses charged against

defendant and covers the timeframe(s) charged in the information . . . .” (*People v. Jeff*, *supra*, 204 Cal.App.3d at p. 342.)

Although couched in due process terms, Cruz’s argument is simply a substantial evidence argument. He was convicted of four counts of committing a lewd and lascivious act on a child under the age of 14 in violation of section 288, subdivision (a). Counts 2 through 4, which he does not challenge on appeal, were based on acts that occurred between July 1, 2003, and December 31, 2004, and the information so charged them. Count 1 alleged acts that occurred between May 1, 2005, and May 31, 2005. Cruz argues there is no evidence of any improper acts during the May 2005 time frame.

The May 2005 incident upon which count 1 was premised was the incident preceding K.M. telling her teacher about the sexual abuse, in which Cruz grabbed her buttocks. “On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Cruz argues there is no substantial evidence of an incident in May 2005 because that was the month K.M. was removed from his home, K.M. never testified to a May 2005 incident in which Cruz slapped her buttocks, and K.M. never claimed to have suffered bruising as a result of Cruz having slapped her on the buttocks.

Substantial evidence supports the conclusion there was improper touching of K.M. by Cruz during the time frame alleged in count 1 of the information, i.e., May 2005. K.M. at first testified that on an unspecified occasion, she walked by Cruz, who was sitting on the couch, and he slapped her on the butt. But later, when asked again about that incident, she said it happened the day she went to her school for the last time, which would have been the day in May 2005 when she told her teacher about being molested. K.M. could not remember bruising, but recalled having pictures taken of her

buttocks when she was taken into protective custody. One of the police officers who interviewed K.M., testified K.M. said that on May 17 or 18, 2005, she walked by Cruz as he sat on the couch watching television, he grabbed her by the arm, and grabbed her buttocks with his other hand, causing her pain. K.M. in fact had bruises on her buttocks, and the officer was told by the other officer and the social worker that K.M. said she had bruises she believed had been caused by Cruz grabbing her.

Cruz focuses on K.M.'s testimony at trial denying having bruises or having said bruises were caused by Cruz grabbing her. He also points out that at trial the second officer who interviewed K.M. said she did not discuss having bruising on her buttocks as a result of being grabbed by Cruz. That there is conflicting evidence regarding whether K.M. attributed her bruises to Cruz, does not render the conviction on count 1 unsupported. There is substantial evidence that a day or two before K.M. reported the sexual abuse to her teacher on May 19, 2005, Cruz had grabbed K.M. on the buttocks causing her pain. There is evidence she had bruises on her buttocks when taken into protective custody. Whether those bruises were actually caused by Cruz's improper touching is not relevant to whether the improper touching occurred. Furthermore, the jury could reasonably infer the bruises were caused by Cruz's act. K.M. said he grabbed her hard enough to cause her pain. Although K.M. testified she did not have bruises on her buttocks when she was taken into protective custody, she remembered pictures were taken of her buttocks, and bruises were documented. She denied having been wrestling with her brother or pushed against a counter, so as to have some other innocuous explanation for her bruises.

Cruz also contends his conviction on count 1 is not supported by substantial evidence of the requisite specific sexual intent. We disagree.

The intent required to prove a violation of section 288, subdivision (a), is the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of the perpetrator or victim. "Criminal intent will rarely be shown by direct evidence and

must frequently be inferred from a defendant's conduct. . . . Intent may properly be inferred from evidence of other specific acts of a similar nature.” (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380.) In *Gilbert*, the court held evidence of defendant's sexual conduct with other young girls was relevant to proving defendant acted with lewd intent on the charged offense. (*Ibid.*)

Here, the jury could infer from Cruz's continuing course of sexual conduct with K.M., that when he grabbed her buttocks in May 2005, he did so with sexual intent. Cruz's reliance on *People v. Mansell* (1964) 227 Cal.App.2d 842, is misplaced. In that case there was an innocent explanation for defendant's acts (touching the victim around her knee), which occurred in a place open to the public within view of third persons, and there was no evidence of a course of conduct. Here, Cruz had been sexually assaulting K.M. since she was 10 years old. Prior to the family's trip to Washington in early 2004, there were occasions on which Cruz orally copulated K.M., fondled her genitals, forced her to touch his penis, and kissed her with an open mouth. K.M. testified Cruz would slap her on the buttocks and tell her he “wanted [her] all for himself.” The jury could infer from his past blatantly sexual conduct towards the girl, that when he grabbed her buttocks in May 2005, he did so with sexual intent.

## *2. Denial of Probation/Section 288.1 Report*

Cruz contends the trial court erred by denying probation. We disagree.

We begin with the relevant facts. The probation report recommended probation be denied. Cruz continued to deny any sexual misconduct. K.M.'s mother asked that Cruz be given probation. Other friends and family members attested to Cruz's good standing in the community. The probation report discussed two psychological evaluations that had been prepared prior to trial, both of which concluded Cruz “is not a pedophile and has a low risk of re-offending.” Dr. Roberto Flores de Apodaca stated his testing showed Cruz showed no “persisting interests in pre-pubertal children of either sex[,]” and if he engaged in the acts he was accused of “it would have been through a



regression from his usual orientation toward age-appropriate, heterosexual females.” There was a 39 percent probability Cruz was “attempting to conceal his having abused a child.” Another psychologist, Wesley B. Maram, reported, “it does not appear [Cruz] has a deviant sexual interest in children.” Nonetheless, the probation report recommended against probation because of the nature and numerosity of the offenses, the age of the victim, and Cruz’s violation of a position of trust.

Prior to the sentencing hearing, the court considered a new trial motion Cruz had filed based on incompetency of his trial counsel. Under questioning by Cruz’s new counsel, Cruz’s trial counsel testified he had advised Cruz of his right to testify at his trial, but advised him to not testify. Cruz did not indicate he wanted to testify at trial. Cruz then testified he had wanted to testify at his trial, but his trial counsel told him not to. Cruz said that had he been permitted to testify at trial he would have explained that he had not committed the offenses and K.E. leveled her charges against him because she became angry when he would not give her money. The court denied the new trial motion.

The court moved on to sentencing. The prosecutor argued against probation advising the court she was concerned about K.E.’s safety. When she had called K.E.’s mother to inform her about the verdict, K.E.’s mother became very hostile, and it was apparent the family had taken Cruz’s side in the matter, against K.E., because Cruz was the family’s primary financial support. K.E.’s mother said the prosecutor had ruined the family’s lives by getting Cruz convicted and the family had no desire to have Cruz incarcerated for a lengthy period of time. The prosecutor argued that incarceration of Cruz would allow K.E. to grow up without his presence in the family, which would be in her best interests since the family would not protect her from him. In denying probation, the trial court noted this was not an isolated incident, but a course of conduct extending over a long period of time, involved substantial sexual contact, and Cruz failed to accept responsibility.

All defendants are eligible for probation, in the discretion of the sentencing court, unless a statute provides otherwise. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Cruz concedes that due to the finding of substantial sexual conduct, he was presumptively ineligible for probation. (§ 1203.066, subd. (a)(8).) Probation under such circumstances can be granted only if the following criteria are met: (1) the defendant is a member of the victim's household and probation is in the best interest of the child victim; (2) rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and will be placed in a recognized treatment program immediately after grant of probation; (3) the defendant is removed from the household of the victim until the court determines the victim's best interests would be served by his return; and (4) there is no threat of physical harm to the victim if probation is granted. (§ 1203.066, subd. (d)(1)(A)-(D).)

“‘The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]’ (*Ibid.*) ‘In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.’ [Citation.]” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

Cruz has not shown an abuse of discretion. He contends all the criteria of section 1203.066, subdivision (d)(1), were met: he was a member of K.E.'s household, he was amenable to treatment, he had been removed from K.E.'s household (because K.E. and her mother no longer lived with the maternal grandmother), and there was no threat of future harm to K.E., because two psychologist had concluded Cruz was not a pedophile and was at low risk of reoffending. Accordingly, Cruz argues, he should have been granted probation.

We cannot say the court's denial of probation exceeded all bounds of reason. Cruz did not demonstrate all of section 1203.066, subdivision (d)(1)'s criteria were met. Although K.E. was no longer in Cruz's household, there was no showing it was in *her* best interests to grant probation to Cruz. Cruz has not accepted responsibility for his acts, and thus was not amenable to treatment. Cruz testified immediately before sentencing he maintained his innocence, and K.E. was simply getting even for his having denied her money. There was information K.E.'s family's sympathies were with Cruz, not K.E. The court could reasonably conclude K.E. was best served by Cruz's incarceration during her remaining childhood years.

In a related argument, Cruz contends the trial court erred by failing to order a psychological report under section 288.1 prior to denying probation. Section 288.1 provides the court may not *grant* probation to a person convicted of committing any lewd or lascivious act on a child "*until* the court obtains a report from a reputable psychiatrist . . . as to the mental condition of that person." (Italics added.) The trial court must order a psychological report under section 288.1 only if a defendant has shown an initial entitlement to consideration for probation, and the trial court is inclined to grant probation. (*People v. Thompson* (1989) 214 Cal.App.3d 1547, 1549.) If the court is not inclined to grant probation, it has no duty to order a section 288.1 report.

Here, Cruz was presumed ineligible for probation under section 1203.066, and he failed to establish the criteria for probation was met. Cruz states the record indicates the trial court had been inclined to grant probation. It was not until he testified right before sentencing (on his new trial motion) that he had committed no crime and K.E. was angry with him for refusing to give her money, that the court had a change of heart. He asserts his retained attorney who represented him on the new trial motion should be "blamed" for that testimony, not he, since his testimony clearly resulted in a denial of probation.

There is nothing in the record supporting Cruz's contention the court initially was favorable to a grant of probation. At the conclusion of the trial, the issue of a section 288.1 report came up. When the prosecutor mistakenly expressed her belief the report was mandatory in all section 288 cases, and the subject of Cruz waiving time for sentencing came up, Cruz's counsel explained the report was only mandatory if the court was going to grant probation. The court noted such a report would take six to seven weeks to prepare and asked defense counsel he nonetheless wanted to waive time for sentencing and obtain a report. He did not. Counsel agreed with the court's assessment that they should wait until the sentencing hearing and if at that time Cruz wanted a section 288.1 report prepared "we can waive time and we can order one." At the sentencing hearing, the court had before it the probation report (which recommended denial of probation), the prosecutor's sentencing brief (arguing against denial of probation), and the prosecutor's current information regarding the family's attitudes. No mention was made of obtaining a section 288.1 report, for obvious reasons—the court was not inclined to grant probation at that time. There was no error.

### *3. Presentence Custody Credits*

Cruz contends, and the Attorney General agrees, the court miscalculated his presentence custody credit by four days. The abstract of judgment reflects 242 days of actual custody credit, 36 days of local conduct credit, for total credits of 278 days. The record discloses, however, that Cruz was entitled to 246 days of actual custody credit. We correct the abstract of judgment to include an additional four days of actual custody credit. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187 [reviewing court may correct error in the abstract of judgment on its own motion or on request of parties].) The abstract of judgment should reflect Cruz is awarded 36 days of local conduct credit plus 246 days of actual credit for a total of 282 days credit.

## DISPOSITION

The judgment is affirmed as modified. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.